Office - Supreme Court, U.S
FILED
JAN 6 1984
ALEXANDER L. STEVAS,
CLERK

No. 83-959

SUPREME COURT OF THE UNITED STATES

October Term, 1983

FRANCES M. HOUGLAND,
ALLAN B. KLEET,
FRED H. GRIMES, and
LARRY BARNETT and CARNEY ALLEN,
as partners of the Certified Public Accounting Firm of Allen and Barnett - - - Petitioners

versus

KEVIN GROSS, as receiver for Hougland Barge Line, Inc., a dissolved Delaware Corporation - - - - - - - Respondent

---

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

JOHN A. BARTLETT
ROBERT G. BREETZ
STITES & HARBISON
600 West Main Street
Louisville, Kentucky 40202
Telephone: (502) 587-3400
Counsel for Respondent

WESTERFIELD-BONTE CO., 619 W. KENTUCKY—P.O. BOX 3281, LOUISVILLE, KY.

TABLE OF CONTENTS

	PAGE
Constitutional Provisions and Statutes Which the Case Involves	1
Statement of the Case	2
Summary of Argument	2
Argument: Certiorari Should Be Denied	3–10
I. The Circuit Court of Appeals Fully Considered the Collusive Jurisdiction Issue and Decided It Correctly	3– 8
A. Petitioner Misconstrues the Facts	3– 5
B. Petitioner Misinterprets *Kramer* and the Requirements of 28 U.S.C. § 1359	5– 6
C. Petitioner Misreads Kentucky Law	6– 8
II. There Are No Special and Important Reasons For Granting Certiorari in This Case	8
III. Denial of Respondent's Right to Sue Would Violate Full Faith and Credit	9–10
Conclusion	11

TABLE OF AUTHORITIES

Cases: PAGE

Bank of Galliopolis v. *Trimble*, 45 Ky. (6 B. Mon.) 599 (1846) 9

Broderick v. *Rosner*, 294 U. S. 629, 642-643 (1935).. 9

Commonwealth, Dept. of Transportation v. *All Points Construction Co.*, 566 S. W. 2d 171, 173 (Ky. App. 1978) 10

Converse v. *Hamilton*, 224 U. S. 243, 260-261 (1912) 9

Erie R. Co. v. *Tompkins*, 304 U. S. 64 (1938) 7

Hackney v. *Newman Memorial Hospital*, 621 F. 2d 1069, 1071 (10th Cir. 1980) 6

Hallam v. *Ashford*, 70 S. W. 197 (Ky. 1902) 9

Hirson v. *United Stores Corp.*, 263 App. Div. 646, 34 N.Y.S. 2d 122, aff'd, 289 N. Y. 564, 43 N. E. 2d 712 (1942) 9

In re Citadel Industries, 423 A. 2d 500, 504-506 (Del. Ch. 1980) 7

Kramer v. *Caribbean Mills, Inc.*, 394 U. S. 823 (1969) 3, 5

Constitutional Provisions:

Article IV, Section 1, Constitution of the United States 1

Section 202, Constitution of Kentucky 7

Statutes and Regulations:

28 U.S.C. § 1359 ..... 1, 3, 5, 6

28 U.S.C. § 1652 1

Rule 17 of the United States Supreme Court 2

Delaware Corporation Code, § 279 ..... 4, 5, 9

Ky. Rev. Stat. § 271A.515 ..... 7, 9

Ky. Rev. Stat. § 271A.520 7

Ky. Rev. Stat. § 271A.525 7

SUPREME COURT OF THE UNITED STATES

No. 83-959

October Term, 1983

FRANCES M. HOUGLAND,
ALLAN B. KLEET,
FRED H. GRIMES, and
LARRY BARNETT and CARNEY ALLEN, as partners of the Certified Public Accounting Firm of Allen and Barnett - - *Petitioners*

v.

KEVIN GROSS, as receiver for Hougland Barge Line, Inc., a dissolved Delaware Corporation - - - - - - *Respondent*

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

CONSTITUTIONAL PROVISIONS AND STATUTES WHICH THE CASE INVOLVES

Respondent takes exception to Petitioners' list hereunder only as follows: (1) In Petitioners' first citation, "28 U.S.C. § 1652" should read "28 U.S.C. § 1359." (2) The first sentence of Article IV, Section 1 of the Constitution of the United States should be added:

> Full Faith and Credit shall be given in each State to the public Acts, Records, and Judicial Proceedings of every other State.

STATEMENT OF THE CASE

Respondent adds to Petitioners' statement only that the shareholders who sought and obtained the appointment of Respondent as receiver for the dissolved Delaware corporation did so on advice of associated Delaware counsel that such was the proper, and indeed the only, method by which the claim of the dissolved corporation could be preserved and asserted in behalf of the corporation.

SUMMARY OF ARGUMENT

Certiorari should be denied because the Sixth Circuit Court of Appeals correctly decided this case, giving full consideration to applicable Kentucky substantive law. Petitioners' challenge of the Sixth Circuit's opinion makes unwarranted fact inferences and misinterprets both the federal law on collusive diversity jurisdiction and Kentucky law as to the right of Respondent to bring this action in Kentucky. There is no *Erie* problem here, since state law was correctly applied or found inapplicable rather than being improperly displaced, so in this case there are no special or important reasons for a grant of certiorari under Rule 17 of this Court. Indeed, if this case had been decided according to Petitioners' view of it, the refusal of Kentucky courts to allow Respondent to bring this suit would have denied full faith and credit to Delaware public acts, records, and judicial proceedings.

ARGUMENT: CERTIORARI SHOULD BE DENIED

I. The Circuit Court of Appeals Fully Considered the Collusive Jurisdiction Issue and Decided It Correctly.

Petitioners admit that "[t]he opinion of the Court of Appeals for the Sixth Circuit . . . contains an excellent analysis of how the different circuits have used *Kramer* [*Kramer* v. *Caribbean Mills, Inc.*, 394 U. S. 823 (1969)] to make 28 U.S.C. [§] 1359 a workable rule." (Petition, p. 9). Respondent would add: not only excellent, but correct and with full and proper consideration of Kentucky substantive law. The Court of Appeals did not ignore Kentucky law but merely rejected Petitioners' unsupported fact inferences and incorrect interpretation of both federal law and Kentucky law.

A. Petitioners Misconstrue The Facts.

Apart from the correct application of the language of 28 U.S.C. § 1359, collusive jurisdiction, to exist, must be found from facts in the case supporting collusion. Petitioners' arguments for collusion in this case have been based at each stage not upon fact but upon unwarranted inferences.

This Court is the third tribunal to which Petitioners have asserted, for various reasons, that the claim asserted by Respondent is, or was, that of the dissolved Delaware corporation. With that assertion Respondent has no quarrel. Yet, Petitioners argue that the lower courts *had* to find collusion because, under law that would apply if a Kentucky corporation were in-

volved instead of a Delaware corporation, the remedy was *not* the corporation's remedy and the shareholders of the dissolved corporation could have prosecuted the claim in their own name. Besides failing to show that shareholders would still have such a remedy under the Delaware law which controls the dissolution of Delaware corporations, Petitioners simply cannot have it both ways. Even if alternative remedies may have existed, it is unreasonable to conclude that the choice of a remedy which would confer diversity jurisdiction over a remedy which would not can be explained only by collusion to manufacture diversity. As noted above, shareholders of the dissolved Delaware corporation (who, like Petitioners, believed that the *corporation* had a claim) sought a legal opinion based on applicable Delaware law and were told by Delaware counsel that the proper way of preserving the corporation's claim was to seek appointment of a receiver under § 279, Delaware Corporation Code. A receiver appointed under § 279 must be a resident of Delaware. These circumstances convinced the Court of Appeals for the Sixth Circuit that the basis for Respondent's appointment was proper and "that the *primary* purpose for the [Respondent's] appointment was not the desire to manufacture diversity jurisdiction." (Opinion of Sixth Circuit Court of Appeals, Petitioners' Appendix p. 14a). (Emphasis added).

In sum, Petitioners are really only asking this Court to second-guess the appellate court's reasoning and analysis of the undisputed facts on the question of collusive jurisdiction (the district court, it should be

noted, did not address the 28 U.S.C. § 1359 issue). There was susbtantial evidence to support the conclusions on this issue below.

B. Petitioners Misinterpret Kramer and the Requirements of 28 U.S.C. § 1359.

Petitioners not only rely upon unwarranted fact inferences to argue error in the finding that 28 U.S.C. § 1359 was not contravened, but misconstrue the law as well. *Kramer* v. *Caribbean Mills, Inc.*, 394 U. S. 823 (1969) does *not* hold that colluision must be found "if diversity of citizenship is created where otherwise there would be none." (Petition, p. 8). Such reasoning would short-circuit all analysis to determine the real party in interest as required under the federal rules. Moreover, *Kramer* deals with creation or manufacture of diversity through a voluntary assignment which Kramer, the assignee, *admitted* was substantially motivated by the desire of assignor's counsel to make diversity jurisdiction available. Here, there was no assignment and diversity was not created or manufactured. Diversity came about only by reason of the requirement of § 279 of the Delaware Corporation Code that Respondent be a Delaware citizen. If the Delaware court which appointed Respondent had been free to appoint a Kentucky citizen as receiver and insisted upon such, there is no evidence (or logic) that the minority shareholders would have for that reason eschewed the only way to vindicate the dissolved corporation's claims.

Indeed, even if (unlike here) a motive to manufacture diversity has been shown in evidence, if an

appointment stems from several other factors as well, the factfinder must weigh all of them to determine whether the *primary* motive was to create diversity. *See, e.g., Hackney* v. *Newman Memorial Hospital,* 621 F. 2d 1069, 1071 (10th Cir. 1980). Here it was found below that there was a valid, even compelling, independent reason for the appointment. Moreover, there is nothing in the record which should have compelled the court below to adopt Petitioners' view that the appointment was an attempt to transform a "local" dispute into an interstate dispute merely because Respondent was required to have Delaware citizenship. The shareholder who initiated the appointment process is a citizen of Texas and, indeed, Delaware has a continuing interest in the process by which the rights of a dissolved Delaware corporation may be vindicated. At bottom, Petitioners attempt to invoke this Court's discretion to hear a case in which the primary source of Petitioners' dissatisfaction is — again — *not* traceable to any defect in the Sixth Circuit's application of 28 U.S.C. § 1359 or any other law upon collusive jurisdiction, but rather to the disinclination of the court below to adopt Petitioners' interpretation of the facts.

C. Petitioners Misread Kentucky Law.

Petitioners would attract this Court's attention by pointing up an *Erie* problem that simply does not exist. That is because the Sixth Circuit not only gave proper consideration to all applicable elements of Kentucky law, but construed the Kentucky statutes according to the plain meaning of their language. Any "incompati-

bility" between the Sixth Circuit's review of Kentucky law and the requirements of *Erie R.R. Co.* v. *Tompkins*, 304 U. S. 64 (1938) is in the imagination of Petitioners.

As already noted, Petitioners are mistaken in the belief that Kentucky law would govern the rights or establish the remedies of shareholders in a dissolved Delaware corporation not doing business in Kentucky when such rights accrue. The remedy for shareholders of a dissolved Delaware corporation more than three years after dissolution to preserve rights that belonged to that corporation is provided in § 279 of the Delaware Corporation Code. *See In re Citadel Industries, Inc.*, 423 A. 2d 500, 504-06 (Del. Ch. 1980).

Beyond that, the provisions of Kentucky law cited by Petitioners were properly found below to be inapplicable. Section 202 of the Kentucky Constitution by its literal language places limitations only upon those foreign corporations transacting business in Kentucky and relates only to the transaction of business on equal terms with Kentucky corporations. Under Ky. Rev. Stat. § 271A.520 the bringing of this lawsuit by the receiver of the dissolved corporation would not constitute the transaction of business. Similarly, by its terms Ky. Rev. Stat. § 271A.525 would not apply to a dissolved foreign corporation which had withdrawn from Kentucky and no longer conducted business there. Finally, as the Sixth Circuit found, Ky. Rev. Stat. § 271A.515 by its literal terms applies only to claims which arise *prior* to dissolution, and whether interpreted as an extension of the corporate "life" of a Kentucky corporation or as a statute of limitation, it

simply does not affect Respondent's ability to prosecute this action in Kentucky courts.

Petitioners' attempts to show an erroneous construction of Kentucky law or a failure to consider Kentucky law, upon examination are reduced to this: Petitioners disagree with the refusal of the Court of Appeals for the Sixth Circuit to read into Kentucky constitutional provisions and statutes language they do not contain, or to adopt a meaning that conflicts with the plain terms they do contain.

II. There Are No Special and Important Reasons for Granting Certiorari In This Case.

Because as noted the Sixth Circuit Court of Appeals decided this case entirely consistent with applicable federal and state law, this case does not meet the criteria set forth in Rule 17 of the United States Supreme Court Rules. Moreover, even if there should be the possibility of some improvement upon the decision of the Sixth Circuit through review by this Court, this case is not the type that warrants the expense of this Court's most precious commodity, its time. This case involves a private dispute of the kind whose resolution, absent constitutional questions, should not carry wide implications within the public realm either of the nation or of Kentucky. That is emphatically so if the Sixth Circuit decision should stand. Indeed, it is only if the decision of the Sixth Circuit had instead been to affirm the District Court's dismissal of the action, denying Respondent's right to bring this action in Kentucky, that serious constitutional questions would have arisen requiring redress by this Court.

III. Denial of Respondent's Right to Sue Would Violate Full Faith and Credit.

Denial of Respondent's right to bring this action in Kentucky could not meet constitutional muster in any case. Even if Petitioners' view of Kentucky law did have merit (which it does not), Kentucky may not interpose its own policies regarding the rights of domestic corporations as a bar to claims of a receiver duly invested by Delaware courts under applicable Delaware law with the authority to bring this action in Kentucky. *Converse* v. *Hamilton,* 224 U. S. 243, 260-61 (1912). Nor may this be done under the guise of merely affecting the remedy. *Broderick* v. *Rosner,* 294 U. S. 629, 642-43 (1935). *See Hirson* v. *United Stores Corp.,* 263 App. Div. 646, 34 N.Y.S. 2d 122, *aff'd,* 289 N. Y. 564, 43 N. E. 2d 712 (1942) (Delaware receiver appointed under predecessor statute to § 279, Delaware Corporation Code, accorded full faith and credit as against later-appointed New York receiver regarding right to dispose of dissolved Delaware corporation's New York assets).

Kentucky law, far from Petitioners' characterization of it, has long permitted a duly-appointed receiver for a foreign corporation to maintain an action in Kentucky courts. *Hallam* v. *Ashford,* 70 S. W. 197 (Ky. 1902). Since this case involves no issue of abatement and revival of an action covered by Kentucky law, *Bank of Galliopolis* v. *Trimble,* 45 Ky. (6 B. Mon.) 599 (1846), is inapplicable to this case. Nor, for that matter, could Ky. Rev. Stat. § 271A.515, even viewed as a two-year statute of limitations, forbid this action,

since Respondent's cause of action did not accrue until March 1980, some three years after dissolution, and Respondent's suit was filed well within the two-year period after accrual.

This Court, practised as it is in viewing the results of cases in their broadest and least-widely-discerned implications, need not look far to see the mischief that could be unleashed if a state had, and were allowed to enforce against the citizens and corporations of another state, a policy of cutting off all claims against officers and other agents of corporations two years after dissolution, regardless of when the claims arose. Many irregularities in the dissolution process could go undetected, and even may not occur, until after the limitation had run, resulting in the total inability of shareholders, creditors and other private parties to call these officers or agents to account in a court of law for illegal acts or other breaches of duty ordinarily actionable. Indeed, Kentucky courts have recognized the impropriety of construing statutes of limitations in a way that would present the anomaly of a limitation period expiring prior to the accrual of the cause of action. *See Commonwealth, Dep't of Transportation* v. *All Points Construction Co.*, 566 S. W. 2d 171, 173 (Ky. App. 1978). It is only the Petitioners herein that would countenance such unjust results. While in fact Kentucky does not have such a public policy, the Constitution's full faith and credit requirement would prevent enforcement of such a policy against a duly-appointed receiver for a dissolved Delaware corporation.

CONCLUSION

For all the foregoing reasons, the petition for a writ of certiorari in this case should be denied.

Respectfully submitted,

JOHN A. BARTLETT
ROBERT G. BREETZ
STITES & HARBISON
600 West Main Street
Louisville, Kentucky 40202
Telephone: (502) 587-3400

Counsel for Respondent

CERTIFICATE OF SERVICE

I hereby certify that three copies of this Response have been served upon all parties required to be served under Rule 28 of the Court by mail, first class postage prepaid, addressed to W. David Denton, Esq., Denton & Keuler, P.O. Box 929, Paducah, KY 42001, counsel for Frances M. Hougland; Richard C. Roberts, Esq., Whitlow, Roberts, Houston & Russell, P.O. Box 995, Paducah, KY 42001, counsel for Allan B. Kleet, Larry Barnett and Carney Allen; and Earle T. Shoup, Esq., Peck, Jackson & Shoup, P.O. Box 7603, Paducah, KY 42001, this 5th day of January, 1984.

Robert G. Brock

Counsel for Respondent